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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 59

(Original No. 639, October Term, 1961)

A. J. SIMLER,
Petitioner,

VERSUS

LESLIE L. CONNER,
Respondent.

BRIEF FOR THE PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1962.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 9-8780

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OPINIONS BELOW

The opinion to be reviewed herein is styled: *A. J. Simler, Appellant* v. *Leslie L. Conner, Appellee*, 295 F.2d 534, wherein the Circuit Court denied the petitioner a jury trial. Prior to the rendition of this opinion by the United States Court of Appeals, Tenth Circuit, the Court of Appeals, Tenth Circuit, in the same case reversed and remanded the cause to the United States District Court for the Western District with instructions to grant a jury trial in conformity with the views expressed in the opinion. This case is found in 282 Fed.Rep. 2nd Series, beginning on page 382.

Prior to the last mentioned opinion, and on January 7, 1960, in an action styled A. J. Simler, Petitioner v. Honorable Stephen S. Chandler, U. S. District Judge for the Western District of Oklahoma, Respondent, on Petition for Writ of Mandamus, the United States Court of Appeals, Tenth Circuit, entered its Order and Judgment, paragraph 1 of said Order being as follows:

> "That the Honorable Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma is hereby directed and ordered to vacate all orders heretofore entered by the United States District Court for the Western District of Oklahoma denying a jury trial to the plaintiff in that certain action entitled A. J. Simler, plaintiff, v. Leslie L. Conner, defendant, Civil No. 8008, and submit to a jury for determination all disputed issues of fact arising in such action."

The complete Order is reflected on pages 108 and 109 of the Printed Record before this Court.

The judgment of the Court of Appeals involved herein was entered on October 12, 1961 (Record pp. 115-117, incl.), *rehearing denied* November 18, 1961, *Petition for Certiorari* filed December 29, 1961, *certiarari granted* January 15, 1962 (82 S.Ct. 440).

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

Seventh Amendment to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined, in any Court of the United States, than according to the rules of the common law."

Rule 38 of the Rules of Civil Procedure containing the pertinent parts thereof as follows:

> "(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> "(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
>
> "(c) Same: Specification of Issue. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action."

Oklahoma Constitution and Statutes as follows:

Art. 2, Sec. 19, of the Constitution of Oklahoma:

"Trial by jury

"The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and criminal cases in courts of record, other than county courts, shall consist of twelve (12) persons; but in county courts and courts not of record, a jury shall consist of six (6) persons. This Section shall not be so construed as to prevent limitations being fixed by law upon the right of appeal from judgments of courts not of record in civil cases concerning causes of action involving less than Twenty Dollars ($20.00). In civil cases, and in criminal cases less than felonies, three-fourths (3/4) of the whole number of jurors concurring shall have power to render a verdict. In ail other cases the entire number of jurors must concur to render a verdict. In case a verdict is rendered by less than the whole number of jurors, the verdict shall be in writing and signed by each juror concurring therein. As amended State Question No. 354, Referendum Petition No. 101. Adopted primary election July 1, 1952."

Art. 7, Sec. 20, of the Constitution of Oklahoma:

"Waiver of jury

"In all issues of fact joined in any court, all parties may waive the right to have the same determined by jury; in which case the finding of the judge, upon the facts, shall have the force and effect of a verdict by jury."

Art. 1, Sec. 1, of the Constitution of Oklahoma:

"The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

Art. 2, Sec. 6, of the Constitution of Oklahoma:

"The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

Title 12, O.S.A., Sec. 554:

"An issue of fact arises: First, upon a material allegation in the petition, controverted by the answer; or second, upon new matter in the answer, controverted by the reply; or, third, upon new matter in the reply, which shall be considered as controverted by the defendant without further pleading."

Title 12, O.S.A., Sec. 555:

"Issues both of law and fact, may arise upon different parts of the pleadings in the same action. In such cases the issues of law must be first tried, unless the court otherwise direct."

Title 12, O.S.A., Sec. 556:

"Issues of law must be tried by the court, unless referred. Issues of fact arising in action for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided."

Title 15, O.S.A., Sec. 57:

"Kinds of fraud

"Fraud is either actual or constructive."

Title 15, O.S.A., Sec. 58:

"Actual fraud defined

"Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

"1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.

"2. The positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true.

"3. The suppression of that which is true, by one having knowledge or belief of the fact.

"4. A promise made without any intention of performing it; or,

"5. Any other act fitted to deceive."

Title 15, O.S.A., Sec. 59, is as follows:

"Constructive fraud defined

"Constructive fraud consists:

"1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,

"2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud."

Title 15, O.S.A., Sec. 60:

"Actual fraud is always a question of fact."

Title 15, O.S.A., Sec. 61:

"Undue influence defined

"Undue influence consists:

"1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him.

"2. In taking an unfair advantage of another's weakness of mind; or,

"3. In taking a grossly oppressive and unfair advantage of another's necessities or distress."

QUESTIONS PRESENTED

The questions presented herein are as follows:

1. In a diversity case in the United States District Court does the Constitution Seventh Amendment and Federal Rules of Civil Procedure govern in determining whether or not a litigant is entitled to a jury trial, or does the state law govern such question?

2. If the Constitution of the United States governs and the Federal Rules of Civil Procedure, then is the petitioner in this case entitled to a jury trial under the pleadings involved herein?

3. If the law of Oklahoma governs in determining whether or not the petitioner is entitled to a jury trial, then is the petitioner entitled to a jury trial under the Oklahoma law under the facts as set forth in the pleadings herein?

STATEMENT

This is an action by the petitioner against the respondent for declaratory judgment asking the United States Court to determine whether or not the petitioner owes the respondent any additional sums as attorney's fees.

Factually, the respondent was the attorney for the petitioner in litigation which arose in 1952, and on the 18th day of July, 1952, Mr. Simler employed Mr. Conner as his attorney by way of a written letter which Mr. Conner prepared and had Mr. Simler to sign. The letter is in words and figures as follows, to-wit (R. p. 4):

"Mr. Leslie L. Conner, Atty.,
410-414 Hightower Bldg.,
Oklahoma City, Oklahoma.

"Dear Sir:—

"Re: Birdine Fletcher Estate
County Court Oklahoma County, Oklahoma.

"This confirms our employment of your self and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

"We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court reporters prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the approximate neighborhood of $1,000.00.

"We also agree to pay you and your firm a reasonable attorney's fee for the services rendered and to be rendered in this case in the County Court, and if necessary in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court or any other court if the matter is successful either by trial or judgment or compromise.

"If the matter is not won, compromised or settled you are not to charge us a fee.

"Yours truly,

"/s/ A. J. Simler

A. J. Simler, for himself and his children."

After this relationship of attorney and client existed, the attorney, Mr. Conner, under the guise of writing a will for Mr. Simler, asked Mr. Simler to come to his office on September 25, 1952, and secured the signature of Mr. Simler to a letter, which apparently had been prepared before Mr. Simler came to the office, since the word "September" and "1952" were on the dated portion of the said letter, and the day of the month was underscored and left blank and supplied with a pen, and was supplied after Mr. Simler arrived. That letter is in words and figures as follows, to-wit (R. p. 12):

"Mr. Leslie L. Conner
Conner, Hilpirt & Britton
Attorneys and Counselors at Law
410-414 Hightower Building
Oklahoma City, Oklahoma

"Dear Sir:

"With reference to my letter of July 18, 1952, employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:

25% of the amount recovered if settled without trial.

33⅓% of the amount recovered if case is tried in County and District Court.

50% of the amount recovered if the case is appealed to the Supreme Court.

"I understand that all expenses, taxes and costs are to be deducted first.

"This is a contingent fee and if nothing is recovered, no fee is to be paid.

"If anything is recovered or settled, I agree to pay you the above fees.

"Yours truly,
"/s/ A. J. Simler"

Mr. Conner secured the services of James E. Grigsby, an attorney, to file in the United States District Court for the Western District of Oklahoma a declaratory judgment action wherein it was sought to have the court declare that the Sisters of St. Francis, a foreign corporation, could not take land outside of a city or town unless it was necessary for such foreign corporation in the carrying out of its

business. Under the then provisions of the Oklahoma Constitution, a foreign corporation could not hold land outside of a city or town unless it was reasonably necessary for its uses in carrying out the purposes of the corporation. The United States District Court dismissed the action by sustaining a motion for summary judgment and no evidence was introduced and appeal was had to the United States Court of Appeals, Tenth Circuit, and such court reversed the United States District Court and ordered judgment entered in favor of A. J. Simler, who was the next of kin of Mrs. Birdine Fletcher, deceased; the property having been willed to the Sisters of St. Francis, and such foreign corporation was utterly forbidden to take the property by reason of the fact that it was a 160-acre farm outside of a city or town, and therefore, Mr. Simler, being the only next of kin inherited and took under the Laws of Descent and Distribution of the State of Oklahoma, the statutory and constitutional provisions prohibiting the foreign corporation from taking under Constitution of Oklahoma, Art. 22, Sec. 2, 18 O.S. 1951, Secs. 1-120, 541-589. The last mentioned case is reported in 210 F.2d beginning on page 99 and styled *Simler* v. *Wilson, et al.*, in which Writ of Certiorari was denied by this Court on April 26, 1954. See 74 S.Ct. 681.

There was other litigation, the Supreme Court of Oklahoma upholding the will of Birdine Fletcher after the County Court (court of original jurisdiction in the will contest), upheld the will, the State District Court on appeal from the County Court upheld the will and was affirmed by the Supreme Court of Oklahoma. Thus, all of

the property, except the farm, located in Caddo County, Oklahoma, went to the Sisters of St. Francis and others not related to the petitioner, and the only benefits he received was the benefit granted to him by the Circuit Court of Appeals in holding that the farm in Caddo County was inherited by the petitioner, A. J. Simler. There was other litigation with reference to paying the costs of administration, that is the executor's fees, estate taxes, attorney's fees for the executor, and Mr. Simler was required to pay out of the proceeds of the farm, which had producing oil wells thereon, all of the executor's fees, attorney's fees for the executor, all the estate taxes, all of which amounted to in excess of $100,000.00. In addition to the above, Mr. Simler paid to Mr. Conner $24,000.00 on attorney's fees, paid all the cost of litigation, including briefs, and even the expenses of his attorneys to Denver, Colorado, and other places, and when the litigation was finally concluded, the petitioner, Mr. Simler, paid Mr. James E. Grigsby, who had a contract with Mr. Conner to assist him for 28 per cent of Mr. Conner's attorney fee, and after Mr. Grigsby had sued Mr. Simler twice in the United States District Court and attached his farm claiming an attorney's fee against Mr. Simler, through Mr. Conner, Mr. Simler paid Mr. Grigsby $12,800.00 lawyer fee and took an assignment of Mr. Grigsby's interest in the attorney's fee. Then Mr. Arnold Britton, another associate of Mr. Conner's, sued Mr. Simler in the United States District Court and Mr. Simler was forced to and did employ John B. Ogden, the writer of this brief, as his counsel both in the Grigsby case and in the Britton case, to defend him and to assist Mr. Conner in other litigation.

Mr. Conner and Mr. Simler were unable to agree on what additional money Mr. Conner should be paid as his attorney fee, and it was necessary to file this case in the United States District Court for a declaratory judgment, which was filed April 24, 1958. The case originally came for trial before the late Honorable W. R. Wallace, United States District Judge who held that the plaintiff in that case, A. J. Simler, was entitled to a jury trial. Later, the case was transferred to the Honorable Stephen S. Chandler, United States District Judge who held that the petitioner here, plaintiff there, A. J. Simler, was not entitled to a jury trial. Then Mr. Simler filed in the United States Court of Appeals, Tenth Circuit, an action referred to heretofore, asking the United States Court of Appeals to order Judge Chandler to give a jury trial. The United States Court made such an Order on January 7, 1960; see Record pages 108, 109. After this Order was made on the 12th day of January, 1960, the Honorable Stephen S. Chandler sustained the Motion for Summary Judgment and rendered a summary judgment against Mr. Simler. From such summary judgment an appeal was perfected to the United States Court of Appeals, Tenth Circuit, and the United States Court of Appeals reversed; See *Simler v. Conner*, 282 F.2d 382, and held that the appellant there, petitioner here, was entitled to a jury trial. The respondent here, Leslie L. Conner, filed Petition for Certiorari in this Court; see *Conner v. Simler*, 367 U.S. 486. Certiorari was denied. On petition for rehearing this Court vacated the judgment of the Court of Appeals, Tenth Circuit, and directed the Court of Appeals to reconsider its opinion in the light of *Southard v. McDonald*, 360 P.2d 940. The Court of Appeals

did reconsider, and on reconsideration held in effect that this case should be tried without a jury. See 295 F.2d 534 and Record pp. 115-117, incl. It will be noted from reading the last opinion of the United States Court of Appeals, Tenth Circuit, that such court held that State Law should be applied in determining whether this case should be tried with or without a jury.

Therefore, we come to argue before this Court that the Federal Law should be applied, and that the United States Court of Appeals was in error in applying the State Law to a diversity case in the Federal Court, although we do not concede and will attempt hereinafter to show that under State Law the petitioner is entitled to a jury trial, but will first present here under Proposition 1 that the Federal Law and the Federal Constitution should control in determining the right to a jury trial in the Federal Court.

SUMMARY OF ARGUMENT

The decision below is unwarranted as we view it, and we actually feel that the Constitution itself is plain and unequivocal. There is here no question about a Demand for a Jury Trial. The petitioner demanded a jury trial when he filed his Complaint. He demanded a jury trial when he filed his Reply, and he again demanded a jury trial when he filed his Response to Motion for Summary Judgment.

While this Court has never passed squarely upon the question as to whether or not State Law or Federal Law

should control, but this Court has held, as we view it, in effect in several cases that the Federal Law and the United States Constitution should control in the United States Court.

In the case of *Dairy Queen, Inc., Petitioner v. Hon. Harold K. Wood, Judge, et al.*, decided April 30, 1962, 82 S.Ct. 894 and following, we quote from such opinion as follows:

> "At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury—that based upon the view that the right to trial by jury may be lost as to legal issues where those issues are characterized as 'incidental' to equitable issues—for our previous decisions make it plain that no such rule may be applied in the federal courts. In Scott v. Neely, decided in 1891, this Court held that a court of equity could not even take jurisdiction of a suit 'in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief.'
>
> * * * * * *
>
> "The Federal Rules did not, however, purport to change the basic holding of Scott v. Neely that the right to trial by jury of legal claims must be preserved. Quite the contrary, Rule 38(a) expressly reaffirms that constitutional principle, declaring: 'The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.' * * *"

In 79 S.Ct.Rep., page 1484, 360 U.S. 308, *Jackson D. Magenau, Administrator v. Aetna Freight Lines, Inc.*, Syllabi 3 and 4 are as follows:

"Under federal judicial system, determination of disputed questions of fact in civil common-law action is for jury.

"Where state practice rule requiring disputed factual issue to be tried to court is not an integral part of special relationship created by statute, federal court, in diversity case, should not follow state rule."

In the case of *Chicago, R. I. & P. R. Co. v. Cole*, 51 S.Ct. 383, 283 U.S. 91, 40 S.Ct. 68, the Court said:

"A state is not compelled by the federal Constitution or its amendments to maintain the familiar line between the functions of the jury and those of the court, but may do away with the jury altogether, modify its Constitution or the requirements of a verdict, or the procedure before the jury, and may confer larger powers on the jury than those generally prevailing."

In the case of *Allen v. Matson Navigation Company*, 255 F.2d 273, the Ninth Circuit, in Syllabus 10, said:

"The kind of jury trial to which parties are entitled in federal courts under federal rules is that preserved by Seventh Amendment, to which doctrine of Erie v. Tompkins is subservient, Fed. Rules Civil Procedure rules 38, 39, 28 U.S.C.A.; U.S.C.A. Const. Amend. 7."

We also quote from the body of the opinion as follows:

"We also note that while circumstances would not in our opinion alter results here, yet the sufficiency of certain evidence to raise a question of fact for jury should not be controlled by state law. 5 Moore's Fed. Practice 2d Edition Article 38.10 page 102."

See also to the same effect, *Pogue v. Great Atlantic & Pacific Tea Company*, 5 Cir., 242 F.2d 575, 582; *Wright v. Paramount-Richards Theatres*, 5 Cir., 198 F.2d 303, 305; *Reuter v. Eastern Air Lines*, 5 Cir., 226 F.2d 443, 445; *Reynolds v. Pegler*, 2 Cir., 223 F.2d 429, 433, 434. An examination of these cases, we think will convince the Court that these circuits are convinced that state law has nothing to do with determining right of trial by jury or kind of jury trial to which a litigant is entitled.

In the case of *Dick v. New York Life Insurance Company*, 79 S.Ct. 921, the Supreme Court said:

> "A decision as to which standard should be applied can well be left to another case which question is briefed and argued."

In the case of *Wright v. Paramount-Richards Theatres*, cited *supra*, the Fifth Circuit in Syllabus 1 said:

> "While federal Court of Appeals, as well as federal District Court for Louisiana district, is just another tribunal for interpreting and applying substantive law of Louisiana in personal injury actions of which such courts have jurisdiction solely because of diversity of parties' citizenship, federal courts are bound by federal constitutional amendment guaranteeing jury trial and providing that no fact tried by jury shall be reexamined in federal court otherwise than according to common law rules, which are not recognized by Louisiana, under civil law of which appellate court gives judgment on facts without jury's intervention. U.S.C.A. Const. Amend. 7."

In *Pogue v. Great Atlantic and Pacific Tea Company*, 242 F.2d 575, the Fifth Circuit in Syllabus 4 said:

"The kind of jury trial to which parties to a Florida negligence action tried in a federal court were entitled under rules of civil procedure was that preserved by Seventh Amendment to the Constitution. Fed. Rules Civ. Proc. rules 38, 39, 28 U.S.C.A., U.S.C.A. Const. Amend. 7."

In the case of *Bowie* v. *Sorrell*, 209 F.2d 49, the Court said in Syllabi 3 and 4 as follows:

"(3). Where separate trial was ordered on issue of validity of release pleaded by defendant as defense to tort action and attacked by plaintiff as being invalid because of fraud, plaintiff was entitled to jury trial on such issue. Fed. Rules Civ. Proc. rule 42(b), 28 U.S.C.A.

"(4). Question whether Plaintiff in tort action was entitled to jury trial in separate trial on issue of validity of release relied upon by defendant and attacked by plaintiff as being invalid because of fraud would be determined by federal law, not by state law. Fed. Rules Civ. Proc. rule 42(b), 28 U.S.C.A."

In *Beacon Theatres, Inc.* v. *The Honorable Harry C. Westover, Judge of the United States District Court of the Southern District of California*, 79 S.Ct. 948, 359 U.S. 500, the Court held in Syllabus 4 as follows:

"The Declaratory Judgment Act preserves right to jury trial for both parties. 28 U.S.C.A., Secs. 2201, 2202."

and in Syllabus 22 as follows:

"In federal courts, right to jury trial cannot be dispensed with, except by consent of parties entitled to it; nor can it be impaired by any blending with a

claim, properly cognizable at law, of demand for equitable relief in aid of legal action, or during its pendency. Fed. Rules Civ. Proc. rules 1, 2, 18, 39(a), 28 U.S.C.A.; 28 U.S.C.A., Sec. 2072; U.S.C.A. Const. Amend. 7."

In the case of *Jackson D. Magenau, Administrator* v. *Aetna Freight Lines, Inc.*, 79 S.Ct. 1184, 360 U.S. 308, Syllabi 3 and 4 are as follows:

"Under federal judicial system, determination of disputed questions of fact in civil common-law action is for jury.

"Where state practice rule requiring disputed factual issue to be tried to court is not an integral part of special relationship created by statute, federal court, in diversity case, should not follow state rule."

Herron v. *Southern Pacific Co.*, 283 U.S. 91, 51 S.Ct. 383, 75 L.Ed. 857, was an action brought in the Federal District Court for Arizona to recover damages for personal injuries. At the close of plaintiff's case the court sustained the defendant's motion for a directed verdict upon the ground that plaintiff was guilty of contributory negligence. Plaintiff appealed. Section 5, Article 18, of the Constitution of Arizona provided that the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all time, be left to the jury. In view of this requirement, the Court of Appeals certified the following questions of law for the decision of the Supreme Court.

"First. Is the above provision of the constitution of the State of Arizona binding and controlling upon a

Federal court sitting in that State? Or, putting the question in another form:

"Second. May a Federal court sitting in the State of Arizona direct a verdict for the defendant in an action to recover damages for personal injuries, when it appears as a matter of law that the plaintiff was guilty of contributory negligence, notwithstanding the state constitutional provision to the contrary?"

The Supreme Court answered the first question in the negative; the second in the affirmative.

MR. CHIEF JUSTICE HUGHES spoke for the Court:

"The State, without violating the requirements of due process, may provide such a rule for its own courts, as it may do away with the jury altogether (Chicago, Rock Island & Pacific Ry. Co. v. Cole, 251 U.S. 54, 56, 40 S.Ct. 68, 64 L.Ed. 133), but in view of its nature and effect, the rule cannot be regarded as one that relates merely to practice or to a 'form' or 'mode of proceeding.' The provision 'cuts deep into the right, observed at common law, by which a defendant can obtain a decision by the court, upon a proven state of facts.' Atchison, Topeka & Santa Fe Ry. Co. v. Spencer, 20 F.2d 714, 716. Even with respect to the burden of proof as to contributory negligence, this Court has said: 'But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case . . . But the United States courts have uniformly held that as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle, even in trials in States which hold that the

burden is on the plaintiff.' Central Vermont Ry. Co. v. White, 238 U.S. 507, 512, 35 S.Ct. 865, 59 L.Ed. 1433. See, also, Beutler v. Grand Trunk Junction Ry. Co., 224 U.S. 85, 88, 32 S.Ct. 402, 56 L.Ed. 679.

"Nor is the provision applicable, which the appellant invokes, that 'the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' USC Tit 28, Sec. 725. *THE CONTROLLING PRINCIPLE GOVERNING THE DECISION OF THE PRESENT QUESTION IS THAT STATE LAWS CANNOT ALTER THE ESSENTIAL CHARACTER OR FUNCTION OF A FEDERAL COURT.* The function of the trial judge in a federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court under either the Conformity Act or the 'rules of decision' Act . . ."

It would seem absurd to say that a state could pass a law which would take away from a citizen of the United States his right to a jury trial in the United States Court as guaranteed to said citizen by the Seventh Amendment. The rights guaranteed and given to a citizen by the Constitution of the United States cannot be altered, changed or modified by state law. The cases are too numerous to mention and recently written by this Court where states have attempted to pass laws to take from citizens their rights as guaranteed to them under the Constitution of the United States, and these cases have had primarily to do with the question of integration, and this Court has

consistently held that a state cannot pass a law which is anywise repugnant to or which takes or attempts to take from a citizen his or her rights under the Constitution of the United States.

Thus, as applied to this case, the Seventh Amendment gives to a person the right to a trial by jury in the United States Court. Therefore, it would be immaterial what the opinions of the state court are, or what the laws of the state in which the action arose are, with reference to a trial by jury for the reasons as heretofore stated. State laws and state constitutions can only apply to the procedure in the state courts, and can in nowise overrule or override the constitutional guarantee in the United States States Court of right to trial by jury.

The so-called letter of September 25, 1952, is not a contract but merely a letter which Mr. Conner prepared and had Mr. Simler sign, and which Mr. Conner did not sign, and in order to present the point here we wish to re-quote the letter as follows:

"Mr. Leslie L. Conner
Conner, Hilpirt & Britton
Attorneys and Counselors at Law
410-414 Hightower Building
Oklahoma City, Oklahoma

"Dear Sir:

"With reference to my letter of July 18, 1952, employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:

25% of the amount recovered if settled without trial.

33⅓% of the amount recovered if case is tried in County and District Court.

50% of the amount recovered if the case is appealed to the Supreme Court.

"I understand that all expenses, taxes and costs are to be deducted first.

"This is a contingent fee and if nothing is recovered, no fee is to be paid.

"If anything is recovered or settled, I agree to pay you the above fees.

"Yours truly,
"/s/ A. J. Simler"

It will be noted from a reading of this letter that it only applied under three conditions: First, the provision with reference to settling without trial. Second, the provision with reference to settling if tried in County Court or District Court; Third, the provision with reference to the Supreme Court of Oklahoma. However, since this letter was not signed by Mr. Conner, and since Mr. Conner was already obligated under the letter of July 18, 1952, to receive a reasonable fee for his services, there was absolutely no consideration for the second letter, because Mr. Conner was already bound by the first letter although he didn't sign it, but it must be assumed he accepted the employment under it to represent Mr. Simler to the best of his knowledge, skill and understanding. He could not do more than this, and therefore, the letter is void for the simple reason that there was no consideration whatsoever for it.

We call to the Court's attention the general principle of law to the effect that a promise to do what one is already bound to do is no consideration whatsoever. Corpus Juris Secundum, Volume 17, page 465, Article 112, is as follows:

> "SUBSISTING CONTRACTUAL OBLIGATIONS IN GENERAL. Generally the promise of a person to carry out a subsisting contract is no consideration as he is due no more than he was already obliged to do. The promise of a person to carry out a subsisting contract with the promise or performance of such contractual duty is really no consideration as he is due no more than he was already obliged to do and hence has sustained no detriment nor has the other party to the contract obtained any benefit. Thus a promise to pay additional compensation for the performance by the promisee of a contract which the promisee is already under obligation to the promissor to perform is without consideration and this rule has been applied to building and construction contracts."

The Supreme Court of Oklahoma in *Watson* v. *American Creosote*, 184 Okla. 13, 84 P.2d 431, said:

> "An agreement to do or the doing of that which a person is already bound to do under a contract does not constitute sufficient consideration for a new promise."

The Court in the body of the opinion says:

> "At most it is only an agreement on the part of the plaintiff to do that which he was already obligated and bound to do and did not constitute a sufficient consideration."

Citing *Schuler* v. *Myton*, 48 Kan. 282, 29 Pac. 163, and *Harris* v. *Harris*, 9 Col. App. 211, 47 Pac. 481.

In the case of *Cuneo Press, Inc.* v. *Claybourn Corporation*, 90 F.2d 233, Court of Appeals, Seventh Circuit, said:

> "Promise contained in subsequent agreement to do that which one is already obligated to do confers no advantage on promissee, imposes no detriment on promissor and is without consideration."

The Court further said in Syllabus 2:

> "Consideration is necessary to support waiver or release of right whether accomplished by original instrument or by modification of existing contract."

In the body of the opinion the Court said "modification of a contract by subsequent agreement is subject to the rules governing all contracts. Consequently any promise therein contained to do that which one is already obligated to do confers no advantage on the promissee, imposes no detriment on the promissor and is without consideration." Citing many cases and quoting further from the same authority, in other words consideration is necessary to support a waiver or release of rights whether accomplished by an original instrument or by modification of an existing contract, citing many authorities. Consequently the letter of September 25, 1952, which was drawn by Mr. Conner and which letter purported to grant 25 per cent if settled without trial, 33 per cent if with trial in County or District Court, 50 per cent if won in the Supreme Court is absolutely void for lack of consideration.

Next, the letter is of no force and effect for the further reason that at the time it was signed by Mr. Simler, Mr. Conner was Mr. Simler's attorney, and the Supreme

Court of Oklahoma in the case of *Hauenstein* v. *McCalister*, 172 Okla. 613, 46 P.2d 552, said:

> "The main issue involved in this case was whether a new contract of employment was made between the parties. Plaintiff claimed that he turned this money over to defendant to be used in paying all claims listed in the bankruptcy matter, and that the residue, if any, remaining after paying said claims was to have been returned to him. Defendant contended that a new contract of employment had been made between himself and the plaintiff by which the plaintiff was to place in his hand the sum of $3,500, and that out of this sum the defendant was to pay the Hubbard judgment, which amounted to $1,115, and the balance was to be retained by defendant as attorney's fee for closing the bankruptcy proceedings and for defending the threatened criminal prosecutions. The jury by their verdict, decided the issue in favor of the defendant, as to the existence of the new contract, but awarded the plaintiff judgment for the sum of $1,259.15 instead of the sum prayed for in his petition."

The Court further said:

> "It is a well established rule of law that contracts between attorney and client to the advantage of the attorney, made while such relation exists, are presumptively fraudulent, and the burden of proof is upon the attorney to show that such contracts are fair, just and equitable, AND EVEN THEN HE IS NOT ENTITLED TO RECOVER MORE THAN REASONABLE COMPENSATION FOR HIS SERVICES, REGARDLESS OF THE CONTRACT PRICE." (Emphasis supplied.)

There is, as we view it, no way the letter of the 25th of September, 1952, should be considered in this case. As stated above, there was absolutely no consideration for it and it is, therefore, void. Next, it was made while the relationship of attorney and client existed between Mr. Conner and Mr. Simler, and the Oklahoma Supreme Court has passed squarely on such a case and holding that such, even if it should be construed to be a contract, was presumptively fraudulent, and the burden of proof is upon the attorney to show that such contracts are fair, just and equitable. AND EVEN THEN HE IS NOT ENTITLED TO RECOVER MORE THAN REASONABLE COMPENSATION FOR HIS SERVICES, REGARDLESS OF THE CONTRACT PRICE. His letter of July 18 says he shall receive reasonable compensation for his services. Consequently, the second letter could not be of any force and effect and should be stricken from the consideration of the trial court for the reasons hereinabove indicated.

The case should be, as we view it, submitted to the jury under the evidence presented by the parties, and for the jury to determine what is reasonable compensation for the services performed by Mr. Conner.

We call to this Court's attention the case of *A. C. Rupp v. Cortland N. Cool*, decided by the Supreme Court of Colorado on May 29, 1961, and found in 362 P.2d at page 396. This was an action to recover a balance allegedly owing for legal services rendered by Cortland N. Cool, a practicing attorney, against his client, Rupp. The Supreme Court of Colorado reversed this cause and said in the body of the opinion as follows:

"Once the confidential relationship of attorney and client exists, the law governing contracts entered into between them is very different. The test applied to such contracts when the attorney seeks to enforce the same is well stated in 7 C.J.S. Attorney and Client Sec. 204(2):

> 'Where after the relationship has been established, an attorney and client enter into an agreement in reference to the attorney's compensation, * * * the burden is on him to prove that the agreement was fairly and openly made, was supported by an adequate consideration, and that he gave the client full knowledge of the facts and of his legal rights, when he entered into the agreement, and that the services to be performed were reasonably worth the amount stated in the agreement; * * *'

"It is quite apparent that at the time of trial Cool had come to a realization of the fact that he could recover only such amount as would constitute reasonable compensation for services rendered. No doubt such realization prompted his motion to amend, which motion was renewed after all testimony had been presented. The trial court committed reversible error in denying the motion, in rejecting tendered evidence with reference to the reasonable value of the services rendered, and in entering judgment for $1,581.26 without any proof as to the value of the services rendered.

"The remaining question presented for our resolution is: Was Rupp entitled to a jury trial?

* * * * * *

"Rule 38, R.C.P. Colo., provides:

> '(a) WHERE JURY RIGHT EXISTS. Upon demand, in action for the recovery of specific real or personal property, with or without damages, or

for money claimed as due on contract, or as damages for breach of contract, or for injuries to person or property. *AN ISSUE OF FACT MUST BE TRIED BY A JURY, UNLESS A JURY TRIAL IS THEREAFTER WAIVED.*" (Emphasis supplied by Court.)

In the case of *Cassel v. Gregori, et al.*, decided by the Appellate Department, Superior Court of Los Angeles County, California, and found in 70 P.2d beginning on page 721, the Court fixed the fee of plaintiff's attorney and required plaintiff to pay such fee. The plaintiff appealed and the case was reversed. This Court said in the syllabus as follows:

"2. Although a law is 'general' and constitutional when it applies equally to all persons embraced in a class founded on some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privilege or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, on a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.

"3. A statute authorizing the court to fix the compensation of an attorney who is withdrawing from a case in which his fee is contingent on the recovery of money is void since it establishes an arbitrary classification in violation of constitutional requirement that all laws of a general nature shall have a uniform application.

"4. The right of trial by jury secured by the Constitution is the right as it existed at common law at the time the Constitution was adopted (Const. Art. 1, Sec. 7).

"5. A statute authorizing the court on application of an attorney to fix the attorney's compensation in a case from which the attorney is withdrawing and in which his fee is contingent on the recovery of money infringes the constitutional guaranty of trial by jury. (Code Civ. Proc. Sec. 284, as amended by St. 1935, p. 1647; Const. Art. 1, Sec. 7.)

"6. Any act of the Legislature attempting to abridge the constitutional right of trial by jury is void. (Const. Art. 1, Sec. 7.)

"7. Although the constitutional guaranty of a trial by jury does not secure the right in special proceedings, the Legislature may not at will create new forms of special procedure, and parcel out among them the subject-matter of ordinary actions at law previously triable by jury, and thereby whittle away the right to a jury trial (Const. Art. 1, Sec. 7)."

And in the body of the opinion the Court said:

"The rule on the matter of classification is well settled, and was stated thus in the early case of Pasadena v. Stimson (1891) 91 Cal. 238, 251, 252, 27 P. 604, 607, 'The conclusion is that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.' This rule has been adhered to ever since it was thus declared. (citing numerous cases).

"Applying this rule to the present case, and passing by the question whether contingent fee cases as a whole would constitute a separate class justifying special provisions regarding attorney's fees, we entertain no doubt that the special classification of contingent fee cases made by this statute is arbitrary and invalid.

* * * * * *

"We think that, when applied to such a case as we have here, it also infringes the constitutional provision for trial by jury. The right of trial by jury which is secured by section 7, article 1, of the Constitution, above quoted, is the right as it existed at common law at the time our Constitution was adopted.

"* * * This does not mean, however, that the Legislature may at will create new forms of special procedure, parcel out among them the subject-matter of the ordinary actions at law heretofore triable by jury, and thereby whittle away the right to a jury trial. * * *.

"The order appealed from is reversed, with costs of appeal to the appellant."

Conclusions as to First and Second Questions Presented

We therefore most respectfully urge that the Seventh Amendment to the Constitution of the United States, the Federal Rules of Civil Procedure, and the Laws of the United States govern in determining whether or not a litigant is entitled to a jury trial in the United States District Court, and the State Statutes or opinions of the State Supreme Court have no application whatsoever, and that

clearly under the facts as shown by the pleadings in this case, the petitioner, A. J. Simler, is entitled to a jury trial in this case.

Under Oklahoma Law the Plaintiff Is Entitled to a Jury Trial

We now call to the Court's attention the Oklahoma authorities in relation to a jury trial. Counsel sought and was granted in this Court an order requiring the Circuit Court to re-examine its former opinion after *Southard* v. *MacDonald* (Okla.), 360 P.2d 940, was handed down by the Supreme Court of Oklahoma. We wish to call to the Court's attention that *Southard* v. *MacDonald*, as we view it, has no application to the facts reflected by the pleadings in this case. The Supreme Court of Oklahoma in discussing the case quotes Section 556, 12 Oklahoma Statutes as follows:

> " 'Issues of fact arising in actions for * * * recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference * * * ordered, as hereinafter provided.'
>
> "We find that the cases cited by the plaintiffs are different from the case here involved, because the primary issue in the cases cited was the recovery of specific real and personal property.
>
> * * * * * *
>
> "Are plaintiffs entitled to a jury trial because they sought to recover money from MacDonald? In Howard v. Stanolind Oil & Gas Co., 197 Okl. 269, 169 P.2d 737, 741, we said:

> 'It is well settled that an action, the primary purpose of which is to set aside deed conveying real estate and obtaining a decree re-investing title in plaintiffs, is one of equity and in such action neither party is entitled to a jury. Stow v. Bruce, 178 Okl. 127, 61 P.2d 1403.'

"Again in paragraph 1 of the syllabus in Ward v. Lindly, Okl., 294 P.2d 296, we said:

> 'In action by grantor's heir to cancel deed, because of grantor's incapacity, and for possession of the premises, neither party was entitled to jury trial on theory that cause of action was primarily one for possession of the land, since heir was not in a position to bring action for possession until deed was canceled and the action was one of equitable cognizance.' * * *"

Without discussing this case further, we call to the attention of the Court that the Supreme Court of Oklahoma in the *Southard* v. *MacDonald* case cited with approval *Haunstein* v. *McCalister*, 172 Okla. 613, 46 P.2d 552. Since the issue presented in this partition suit where it was sought to divide the land in *Southard* v. *MacDonald*, and some of the heirs asked to have the deed cancelled which had been given to MacDonald for attorney's fees, the Court in effect held that it was actually a suit to cancel a deed and therefore no jury was required. This has always been the holding of the Supreme Court of Oklahoma that a suit to cancel a deed is an equity matter. There is no deed involved in this case. The petitioner is merely asking the court to determine how much, if any, he owes to his former attorney, and the attorney filed a cross-complaint

asking for specific real property or personal property as selected by the Answer and Cross-Complaint herein, and under Section 556, 12 O.S.A., and all the holdings of the Supreme Court of Oklahoma on the subject, clearly show that the petitioner is entitled to a jury on the issues as thus raised by the pleadings.

The Supreme Court of Oklahoma in the case of *Wolfe v. Campbell*, 107 Okla. 112, 230 Pac. 505, said:

> "ISSUE AS TO WHAT IS REASONABLE ATTORNEY'S FEE FOR JURY. In such action the issue as to what would be a reasonable attorney fee for services rendered is an issue of fact to be determined by a jury from the evidence. The court further said in an action for specified attorney fee where issue is joined as to what is a reasonable fee, such issue is for the jury, notwithstanding the plaintiff may pray that an equitable lien be decreed against defendant's land. In such case, the jury may properly determine the issue of fact and return a verdict for what it finds to be a reasonable fee, the court may then render judgment for the amount of the verdict, and, in the exercise of its equity powers, decree a lien against the defendant's land for the satisfaction of the judgment. The fact that decreeing a lien calls for the exercise of equity powers by the court does not take from the jury the power to first determine the issue of fact as to what fee is reasonable, a determination of the fee being the foundation of the right to a lien."

We quote from the body of the opinion:

> "This was a suit for the recovery of a money judgment, $2,000.00 attorney's fee. Under Section 532, C. L. 1921, the amount in controversy being an issue of fact arising in an action for the recovery of money, de-

fendants in error were entitled as a matter of right to a jury verdict. Said Section 532, together with Section 533, id., being the sections of our Code which provide what issues may be tried to a court and what issues as a matter of right must be tried to a jury, unless waived, read as follows:

"Section 532. 'Issues of law must be tried by the court unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided.'

"Sec. 533. 'All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by jury or referred as provided in this Code.'

"Hence the action being for the recovery of money, and the issue as to what amount, if any, should be recovered, being an issue of fact arising out of an action for the recovery of money, it was properly an issue to be determined by the jury, and the testimony as to the value of services being in conflict, plaintiff's attorneys testifying what they were worth, and defendants' attorneys testifying that they were worth less, the jury being judge of the credibility of the witnesses and weight of the testimony, its verdict will not be disturbed, if reasonably supported by the evidence, following the rule in Snyder v. Stribling, 18 Okl. 168, 89 P. 222, and Wallingford v. Alcorn, 75 Okl. 295, 183 P. 726."

In the case of *Opperud v. Twedell*, 175 Okla. 191, 51 P.2d 799, the Supreme Court of Oklahoma speaking on the subject said in the body of the opinion:

"A comprehensive examination of the evidence introduced in behalf of the plaintiff shows it to be sufficient, if accepted as true, to warrant a conclusion that the plaintiff was employed by the defendant to transact the business of others as well as her own and that the plaintiff had not been paid in full for the services thus rendered. That is, it was sufficient to present a disputed question of fact which should have been submitted to the jury. Whether the jury would accept the evidence and resolve the disputed question in favor of the plaintiff is, of course, an entirely different question."

As heretofore quoted, Title 15, Oklahoma Statutes Annotated, Section 60, is as follows:

"Actual fraud is always a question of fact."

The Supreme Court of Oklahoma in *Operators Royalty & Producing Co.* v. *Greene*, 173 Okla. 383, 49 P.2d 499, said in Syllabus 5 by the Court:

"When fraud is properly alleged upon the one hand and denied upon the other, the existence or non-existence of such fraud becomes a question of fact for the jury to determine, under proper instructions, and upon appeal the verdict of the jury upon such facts will not be disturbed by this court, if there is any evidence reasonably tending to support such verdict."

In the body of the opinion the Court said:

"'Fraud' is a generic term, which embraces all the multifarious means which human ingenuity can devise, and are resorted to by one individual to get an advantage over another by false suggestions or by the suppression of the truth. No definite and invariable rule can be laid down, as a general proposition defining

fraud, as it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. Hawkins v. Bryan, 128 Okl. 27, 261 P. 167.

"The evidence being sufficient to carry to the jury the issue of fact as to the existence or nonexistence of fraud, the verdict of the jury upon such issue of fact will not be disturbed by this court, if the issue was submitted to the jury under proper instructions.

"When fraud is properly alleged upon the one hand and denied upon the other, the existence or nonexistence of such fraud becomes a question of fact for the jury to determine under proper instructions, and upon appeal the verdict of the jury upon such facts will not be disturbed by this court, if there is any evidence reasonably tending to support such verdict. Illinois Oil Co. v. Pender, 137 Okl. 82, 277 P. 1026; Hall v. Smith, 126 Okl. 206, 259 P. 537."

In *Illinois Oil Co.* v. *Pender, et al.*, 137 Okla. 82, 277 Pac. 1026, the Supreme Court of Oklahoma in Syllabus 1 by the Court said:

"FRAUD IS QUESTION OF FACT FOR JURY; JURY'S FINDING ON QUESTION OF FRAUD WILL NOT BE DISTURBED ON APPEAL IF SUPPORTED BY EVIDENCE.

"When fraud is properly alleged upon the one hand and denied upon the other, the existence or nonexistence of such fraud becomes a question of fact for the jury to determine under proper instructions, and upon appeal the verdict of the jury upon such facts will not be disturbed by this court, if there is any evidence reasonably tending to support such verdict."

In the body of the opinion the Court used this language:

"This evidence was certainly sufficient to go to the jury on the question as to whether or not this con-

tract was a joint contract. The jury evidently found against the defendant on this issue. It was properly instructed relative thereto, and, there being evidence reasonably tending to support such finding, the same will not be disturbed by this court on appeal. There was no error in denying defendant's motion for a peremptory instruction."

In *Societe Titanor* v. *Sherman Machine & Iron Works*, 172 Okla. 213, 45 P.2d 144, the Court said in Syllabus 1 by the Court:

"Fraud in procuring the execution of a written contract is a question to be determined by the jury under proper instructions, and where the evidence reasonably tends to support the verdict thereon, the same will not be disturbed on appeal."

In the body of the opinion the Court said:

"* * * The defendant says that such was its position in the transaction, and that it relied upon the statements and representations of the plaintiff when it signed the order, and that such statements and representations were fraudulent and resulted in the signing of the contract.

"This amounts to a direct charge of positive fraud. Active, positive fraud is always recognized as a defense in a suit on contract; and whether the defendant was deceived by the alleged misrepresentations of Rossant was a question for the jury. Mount Hope Nurseries Co. v. Jackson, supra."

In *Morris, et ux.* v. *McLendon, et al.*, 167 Okla. 68, 27 P.2d 811, the Supreme Court of Oklahoma in syllabus by the Court said:

"It is only when the evidence, with all the inferences the jury could justifiably draw from it, will be insufficient to support a verdict for plaintiff, that the court is authorized to direct a verdict for the defendant; and, unless the conclusion follows, as a matter of law, that no recovery can be had upon any view that can be properly taken of the facts which the evidence tends to establish, the case should be left to the jury under proper instructions.

"Record examined, and held, that the trial court erred in directing a verdict for defendant."

In the body of the opinion the Court said:

"* * * It was for the jury, instead of the court, to weigh the acts of the parties, their statements and relationships. The court therefore committed error in taking said cause from the jury.

"The judgment of the trial court is reversed, and the cause remanded, with directions to grant a new trial."

CONCLUSION

The petitioner urges that under either Federal or State Law the petitoner is entitled to a jury trial in this cause.

Clearly, the petitioner feels that under the Federal Constitution and Laws of the United States this matter should be determined, but in case the Court should hold that State Law controls as to the determining of the jury question, under the authorities cited immediately above, we feel there can be no question but what the petitioner is entitled to a jury trial. The Statutes of Oklahoma and

the opinions of the Supreme Court construing the same, the Constitution of Oklahoma plainly give the petitoner the right to a jury trial in this case.

There actually has never been a contract signed between the client, Mr. Simler, and his former attorney, Mr. Conner. It must be assumed that Mr. Conner accepted the employment under the letter which he prepared dated July 18, 1952, and this letter provided for a reasonable attorney's fee. There is no way known to secure more than a reasonable attorney's fee, and consequently, the second letter prepared by Mr. Conner, under the circumstances shown by the pleadings, was a complete nullity because Mr. Conner in preparing this letter attempted to change or modify the previous letter of employment without any consideration whatsoever therefor on either the part of Mr. Conner who was already bound after he accepted the employment to represent Mr. Simler. In addition to the above, the case was never won in the Supreme Court of Oklahoma or in the County Court or District Court of Oklahoma. Consequently, the letter of September 25 could have had no application whatsoever.

In addition to the failure of consideration and the fact that the letter is presumptively fraudulent, and the fact that it had no application to the facts in this case, said letter was further void for the reason that it was simply a letter and not a contract, and not one place in the entire record did Mr. Conner ever sign any contract or agreement or letter purporting to do anything for Mr. Simler, and certainly the letter of the 25th of September could

not be construed as a contract for the reasons hereinabove set forth.

Since the letter of July 18, 1952, provides for a reasonable attorney's fee, we feel that this case should simply be submitted to the jury under instructions for the jury to determine in this case what is a reasonable attorney's fee. Of course, Mr. Conner will be given a full and complete opportunity to present to the jury the amount of work, the matters involved, and so forth, and Mr. Simler will likewise be permitted to offer testimony along the same lines, and both sides can testify as to what they think a reasonable fee should be in the case, and the jury should then determine the matter and this should conclude this litigation.

We therefore most respectfully petition and ask this Honorable Court to issue its opinion, order and judgment in this case reversing said cause and directing the United States District Court for the Western District of Oklahoma to grant to the petitioner a jury trial, to which he is so justly entitled.

Respectfully submitted,

JOHN B. OGDEN,
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Oklahoma City, Oklahoma,
Attorney for Petitioner.

Of Counsel:

JACK M. HIGHLY,
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October, 1962.

CERTIFICATE

I certify that I mailed a true and correct copy of this Brief for Petitioner on Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, to Leslie L. Conner, Hightower Building, Oklahoma City, Oklahoma, and to Phil Daugherty, 219 Couch Drive, Oklahoma City, Oklahoma, and Peyton Ford, 1000 Connecticut Ave., N.W., Washington, D.C., by depositing the same in the United States mail with sufficient postage attached thereto on this, the 5th day of October, 1962.

.....

Counsel for Petitioner.